

IN THE SUPREME COURT OF THE STATE OF DELAWARE

ANDRE McDOUGAL,	§
	§ No. 20, 2012
Defendant Below-	§
Appellant,	§
	§ Court Below—Superior Court
v.	§ of the State of Delaware
	§ in and for New Castle County
STATE OF DELAWARE,	§ Cr. ID No. 1011012275
	§
Plaintiff Below-	§
Appellee.	§

Submitted: July 20, 2012

Decided: September 5, 2012

Before **STEELE**, Chief Justice, **HOLLAND** and **JACOBS**, Justices

ORDER

This 5th day of September 2012, upon consideration of the briefs of the parties and the record below, it appears to the Court that:

(1) The defendant-appellant, Andre McDougal, acting *pro se*,¹ filed an appeal from his September 14, 2011 Superior Court criminal convictions. For the reasons that follow, we conclude that the Superior Court's judgments should be affirmed.

¹ McDougal filed an affidavit in this Court requesting that his counsel be permitted to withdraw and that he be permitted to represent himself in his direct appeal. Supr. Ct. R. 26(d) (iii). Following a hearing in the Superior Court in which McDougal was found to have voluntarily waived his right to counsel, this Court granted McDougal's request to represent himself in his direct appeal. *McDougal v. State*, Del. Supr., No. 20, 2012, Holland, J. (Mar. 7, 2012).

(2) In November 2010, McDougal was indicted on charges of Trafficking in Heroin, Possession With Intent to Deliver Heroin, Possession of a Firearm During the Commission of a Felony, Possession of a Firearm By a Person Prohibited and Receiving a Stolen Firearm. In September 2011, McDougal went to a jury trial and was convicted of Trafficking in Heroin, Possession With Intent to Deliver Heroin and Possession of a Firearm by a Person Prohibited.² McDougal was sentenced as a habitual offender to prison for the remainder of his natural life on each drug conviction; and was sentenced to five years at Level V on the weapon conviction.³

(3) The following evidence was presented at trial. On November 18, 2010, at approximately 10:20 a.m., a detective from the City of Wilmington Police Department's Operation Safe Streets was conducting surveillance in the 2300 block of Carter Street in Wilmington, Delaware. The area was known by police to be a high crime area with drug trafficking activity. The detective conducted his surveillance with binoculars from a nearby rooftop. The day was clear and the detective had an unobstructed view of the target area.

² McDougal stipulated that he was a person prohibited from possessing a firearm.

³ Previously, in March 2011, McDougal had a contested violation of probation ("VOP") hearing in the Superior Court regarding his probationary sentence on an earlier manslaughter conviction. The charges in the instant case formed the basis for the VOP. McDougal was sentenced for the VOP to seventeen years at Level V, to be suspended after fifteen years for two years at Level III probation. This Court affirmed the finding of a VOP. *McDougal v. State*, Del. Supr., No. 152, 2011, Holland, J. (Oct. 17, 2011).

(4) At approximately 10:35 a.m., the detective's attention was drawn to an African American man, wearing a black leather jacket, who entered the 2300 block of Carter Street from the north. The man, later identified as McDougal, then entered the alleyway on the east side of Carter Street next to a vacant row house at number 2314. After a few seconds, McDougal walked onto the porch at number 2312. It is undisputed that McDougal neither owned nor resided at that property. After a few more seconds, McDougal sat down on the front steps. Another man then entered the porch and stayed a couple of minutes.

(5) Thereafter, two other African American men approached Carter Street from the north. The detective observed McDougal walk back to the alleyway and then quickly leave the alleyway. Thereafter, the detective observed McDougal engage in some kind of interchange with one of the men, who later was identified as James Hamilton. The detective testified that it appeared to him that Hamilton and McDougal engaged in what the police term a "hand-to-hand" transaction involving the exchange of drugs and money. At that point, additional law enforcement was called in to assist. A police sergeant stopped Hamilton and patted him down. While the officer was speaking with Hamilton, four baggies of heroin, each containing a blue

wax paper baggie stamped “Jaguar,” fell from Hamilton’s pant leg onto the ground.

(6) After receiving permission from the property owner, the police searched the porch area at 2312 Carter Street. Under a hat that was sitting on a chair they found a loaded handgun and one hundred thirty baggies, each containing a blue wax paper baggie of heroin with the name “Jaguar” stamped on it. The heroin was packaged as ten bundles of thirteen baggies each. The police detective testified that the heroin, which was later determined to weigh 2.71 grams, had a street value of approximately \$600. At the time the handgun was seized, it was inoperable. No fingerprint or DNA testing was conducted on the weapon, although the serial number indicated that it had been stolen outside the State of Delaware.

(7) In this direct appeal from his drug and weapon convictions, McDougal claims that a) his trial counsel provided ineffective assistance by failing to make the proper objections at trial and failing to move to suppress the gun and drug evidence; b) his constitutional right to confront his accusers was violated when the property owner and James Hamilton were not called to testify; c) his constitutional right to confront his accusers was violated by the admission of the Medical Examiner’s report into evidence; d) his arrest was invalid because the police did not have a reasonable

articulable suspicion to detain him; and e) there was insufficient evidence presented at trial to support his convictions.

(8) McDougal's first claim is that his trial counsel provided ineffective assistance. In most cases, a claim of ineffective assistance of counsel is not reviewable on direct appeal because the claim has not been raised and fully adjudicated by the trial court, resulting in an insufficient record for appellate review.⁴ In this case, McDougal raises several allegations of ineffective assistance, including his counsel's failure to object to hearsay testimony, to compel the presence at trial of certain witnesses and to object to the Medical Examiner's report. Because none of these allegations was raised or adjudicated below, we decline to address them in this proceeding.

(9) However, the State argues that there is a sufficient basis for this Court to rule that, because McDougal's failure to proceed with a suppression hearing was strategic, McDougal's counsel was not ineffective in that one respect.⁵ The trial transcript reflects that, prior to closing arguments, McDougal's counsel stated for the record that he had advised McDougal it would not be wise to move for a suppression hearing because McDougal

⁴ *Desmond v. State*, 654 A.2d 821, 829 (Del. 1994).

⁵ *Strickland v. Washington*, 455 U.S. 668, 688, 694 (1984) (requiring that the defendant demonstrate that a) his attorney's representation fell below an objective standard of reasonableness and b) but for his attorney's errors, there is a reasonable probability that the outcome of the proceedings would have been different).

would have to make prejudicial admissions to support his standing to object to the admission of the evidence. The trial transcript reflects that the judge simply acknowledged McDougal's counsel's statement and noted that the point was preserved for appeal. As such, the claim was never fully presented to the Superior Court and the Superior Court never fully adjudicated the claim. In those circumstances, the claim is ripe for appellate review and we, therefore, decline to address it in this proceeding.

(10) McDougal's second claim is that his constitutional right to confront his accusers was violated at trial because neither the owner of the property at 2312 Carter Street nor James Hamilton was called as a witness.⁶ The trial transcript reflects that neither the property owner nor Hamilton was a witness adverse to McDougal. The police officer's testimony that he had been given permission to search the porch was not adverse to McDougal. Moreover, the trial transcript does not reflect that any statement by Hamilton was offered into evidence against McDougal.

(11) The Sixth Amendment to the United States Constitution, applicable to the states under the Due Process Clause of the Fourteenth

⁶ The record reflects that McDougal's counsel did not object to the State's failure to call either the property owner or James Hamilton as a witness. McDougal's claim is, therefore, subject to plain error review. *Wainwright v. State*, 504 A.2d 1096, 1100 (Del. 1986) (under the plain error standard of review, the error complained of must be so clearly prejudicial to substantial rights as to jeopardize the fairness and integrity of the trial process).

Amendment, guarantees the right of a defendant to confront the witnesses against him. But, if a witness is not adverse to the defendant, the Sixth Amendment right of confrontation is not implicated.⁷ Because neither the property owner nor Hamilton could be deemed to be a witness adverse to McDougal, there was no error, plain or otherwise, with respect to McDougal's second claim.

(12) McDougal's third claim, also subject to plain error review, is that his constitutional right to confront his accusers was violated when the Medical Examiner's report was admitted into evidence without the Medical Examiner's live testimony. The trial transcript reflects that the State presented the necessary testimony from the police to establish the "chain of custody" of the drugs from the porch to the Wilmington Police Department's evidence locker and then to the Medical Examiner's office for testing.⁸ The Medical Examiner's report was admitted into evidence solely to establish the identity and weight of the drugs. We find no error or abuse of discretion on the part of the Superior Court in admitting the evidence, particularly since the record reflects there was no dispute regarding those issues. We,

⁷ *United States v. Kindig*, 854 F. 2d 703, 709 (5th Cir. 1988).

⁸ *McNally v. State*, 980 A.2d 364, 371-72 (Del. 2009) (if there is no issue of adulteration or tampering, a trial judge's admission of chain of custody evidence is reviewed for an abuse of discretion and breaks in the chain of custody go to weight rather than admissibility).

therefore, conclude that there was no error, plain or otherwise, with respect to McDougal's third claim.

(13) McDougal's fourth claim, also subject to plain error review because the issue was not pursued in a motion to suppress, is that the police did not possess a reasonable articulable suspicion to detain him at the time of his arrest. It is well-settled that the police may stop an individual for investigatory purposes if they have a reasonable, articulable suspicion that the individual is committing, has committed or is about to commit a crime.⁹ A reasonable, articulable suspicion is determined by considering the totality of the circumstances as viewed through the eyes of a reasonable, trained police officer in the same or similar circumstances, and by combining the objective facts with the officer's subjective interpretation of those facts.¹⁰ The testimony of the police officer who observed McDougal before, during and after the hand-to-hand transaction clearly established such a reasonable articulable suspicion. As such, we conclude that there was no error, plain or otherwise, with respect to McDougal's fourth claim.

(14) McDougal's fifth, and final, claim, which is likewise subject to plain error review, is that there was insufficient evidence presented to

⁹ *Terry v. Ohio*, 392 U.S. 1, 22 (1968); Del. Code Ann. tit. 11, §1902.

¹⁰ *Jones v. State*, 745 A.2d 856, 861 (Del. 1999) (citing *United States v. Cortez*, 449 U.S. 411, 417-18 (1981)).

support his convictions.¹¹ In reviewing a claim of insufficiency of the evidence, this Court must determine whether, viewing the evidence in the light most favorable to the State, any rational trier of fact could find the defendant guilty beyond a reasonable doubt.¹² In conducting such a review, this Court does not substitute its judgment for that of the jury on issues with respect to witness credibility or conflicting testimony.¹³ Nor does the Court distinguish between direct and circumstantial evidence.¹⁴ The evidence presented at trial fully supports the jury's verdict of guilty on the charges of Trafficking in Heroin¹⁵ and Possession With Intent to Deliver Heroin.¹⁶ The jury's verdict of guilty on the charge of Possession of a Firearm By a Person Prohibited¹⁷ was proper given that McDougal stipulated to his guilt on that charge. We, therefore, conclude that there was no error, plain or otherwise, with respect to McDougal's fifth claim.

¹¹ McDougal moved for judgment of acquittal at the close of the evidence, but only on the charge of Receiving a Stolen Firearm.

¹² *Robertson v. State*, 596 A.2d 1345, 1355 (Del. 1991).

¹³ *Poon v. State*, 880 A.2d 236, 238 (Del. 2005).

¹⁴ *Id.*

¹⁵ Del. Code Ann. tit. 16, §4753A(a) (3) (a).

¹⁶ Del. Code Ann. tit. 16, §4751.

¹⁷ Del. Code Ann. tit. 11, §1448.

NOW, THEREFORE, IT IS ORDERED that the judgments of the
Superior Court are AFFIRMED.

BY THE COURT:

/s/ Randy J. Holland
Justice